meaningless point along the continuum of crime to punishment at which to begin the time for a "speedy trial" running. Pre-indictment delay may be as prejudicial or more to a just deposition of accusations of crime as post-indictment delay, because a potential defendant will be unaware of what he will be expected to defend against, and, thus, inattentive to preserving the evidence necessary to do so. See *American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial*, page 22, (Tentative Draft 1967); Note, *The Right to a Speedy Trial*, 20 Stan. L. Rev. 476, at 488-490 (1968). "Anxiety and concern accompanying public accusation," *United States* v. *Ewell*, 383 U.S. 116, at 120 (1966), is, if anything, intensified when the "public accusation" is made in the media, as in the instant case, while the prosecuting authorities remain inscrutably inactive.

If pre-indictment delay is potentially prejudicial to an accused and the source of anxiety to him, it is none the less so when done negligently, or as the result of the "institutional inefficiency" of the prosecutor's office rather than "purposefully" or "oppressively." Indeed, this Court has most recently found denial of a speedy trial without mention of the motive of the Government for its failure to bring an available defendant to trial. *Dickey* v. *Florida*, 398 U.S. 30 (1970). "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused," *Brady* v. *Maryland*, 373 U.S. 83, at 87 (1963). And the incentive to improve institutional efficiency is notably diminished if inefficiency is tolerated.

Nor should an accused be required to show specific actual prejudice as a condition to assertion of a right

to a speedy trial, if the prejudice claimed is that potentially inhering the lapse of memory through the passage of time. *Taylor* v. *United States,* 238 F.2d 259 (D.C. Cir. 1956). Appellees submit that recollection of what representations, true or false, were made by whom to which customers of an enterprise actively engaged in business over a 23-month period is, if anything, more difficult to preserve than recollection of one's whereabout on a particular day some seven months earlier. Compare *Ross* v. *United States,* 349 F.2d 210 (D.C. Cir. 1965). To require an accused, as a condition to successful assertion of his right to a speedy trial in advance of trial, to make specific showing of prejudice in the form of the loss of his memory of the relevant events places him in an impossible dilemma: a testimonial admission of the absence of specific recollection will bind him to the prosecution's witnesses' version in the event his claim is denied, while any effort at specific recall may contradict his attempted showing of prejudice.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Government's appeal should be dismissed, or the decision of the District Judge should be affirmed.

Respectfully submitted,

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February, 1971

## APPELLEES' APPENDIX

Filed May 5, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 672-70

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WILLIAM R. MARION, SR., et al., *Defendants*.

**Motion To Dismiss Indictment for Failure To Afford Speedy Trial**

The defendant William R. Marion, Sr., moves to dismiss the indictment for failure to commence prosecution of the alleged offenses charged therein within such time as to afford him his rights to due process of law and to a speedy trial under the Fifth and Sixth Amendments to the Constitution of the United States.

For reason therefor, he says:

1. That the indictment charges that defendant engaged in a "scheme and artifice to defraud" from March 15, 1965, through February 6, 1967, but that no event is alleged therein to have occurred after January 19, 1966.

2. That he is informed and believes, and accordingly alleges, that the events charged in the indictment to constitute criminal offenses were the subjects of a series of articles appearing in *The Washington Post* newspaper, a daily newspaper of general circulation in the greater Washington, D. C., Metropolitan area, in October of 1967, and were thus matters of public knowledge as of that time.

3. That, to his best recollection, in the summer of 1968, this defendant voluntarily delivered to Seymour Glanzer, Esq., and Sandor Frankel, Esq. Assistant United States

Attorneys for the District of Columbia, at their request, all of the files of Allied Enterprises, Inc., and that said files have at all times thereafter remained in the possession of the Office of the United States Attorney for the District of Columbia.

4. That, to his best recollection, in the summer of 1968, the defendant voluntarily discussed his activities as an officer of Allied Enterprises, Inc., with the said Seymour Glanzer and Sandor Frankel, Esqs., at their request, and that he fully apprised them of such activities, all of which were, in his opinion, of an entirely innocent nature.

5. That, notwithstanding the foregoing, the Grand Jury herein was not impanelled until September 2, 1969, and defendant was not apprised that the events alleged in the indictment were under consideration by a Grand Jury until advised by counsel that a subpoena had been issued to command his testimony before the same on or about March 16, 1970.

6. That the delay of over five years from the time defendant is first alleged to have commenced the alleged "scheme and artifice" to defraud, of over four years from the time the last event charged in the indictment allegedly occurred, and of nearly three years from the time at which such events became matters of general public knowledge, to the time of filing of the indictment herein, is an unreasonably oppressive and unjustifiable time after the alleged offenses.

7. That the indictment charges defendant with numerous general misrepresentations allegedly made to divers persons, on dates unspecified; with numerous instances of telephone and postal communication of a nature undescribed; and with numerous instances of interstate transportation of securities allegedly false, forged, and altered in respects unknown, over a period of approximately 23 months more than three years past; and, further, that the

indictment charges defendant as both principal and aider and abetter as to each.

8. That it is unreasonable and oppressive, and in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States, to require the defendant to answer and defend against charges of stale offenses, under circumstances requiring precise memory of events long past, and the production of evidence, both testimonial and documentary, which may have become unavailable by the passage of time.

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# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Constitutional provisions, statutes and rule involved | 2 |
| Statement | 3 |
| Summary of Argument | 9 |
| Argument | 12 |
| I. The order dismissing the indictment for lack of speedy prosecution was a decision sustaining a motion in bar directly appealable to this Court under former 18 U.S.C. 3731 | 13 |
| II. The right of an accused to a speedy trial under the Sixth Amendment does not arise until criminal charges have been brought | 15 |
| III. The Due Process Clause of the Fifth Amendment provides no basis for shortening the limitations periods specified by Congress, and the courts should not ordinarily exercise their supervisory powers in this area | 22 |
| IV. Even if judicial examination of preindictment delay were appropriate, relief should not be given without a showing of actual prejudice, which has not been made in this case | 29 |
| Conclusion | 35 |




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